Newport Beach Wireless Ordinance (July 19, 2012 Version)

The following comments are on the version of the Wireless Telecommunications Facilities Ordinance (PA2012-057) / Code Amendment No. 2012-004 presented to the Newport Beach Planning Commission as Agenda Item 5 at its July 19, 2012 meeting.

The comments were prepared by Jim Mosher (jimmosher@yahoo.com), 2210 Private Road, Newport Beach 92660 (949-548-6229) , and are a mix of what may seem major and minor points.

Disclosure

I live in a blufftop home on a "quiet" street overlooking Irvine Avenue, just north of Santiago Road. I enjoy a view across the Upper Newport Bay Nature Reserve to Saddleback Peak in the distance. The only unnatural object impairing my view is the top of a City-owned streetlight pole in the public right-of-way along Irvine Avenue. In March 2007 the City Planning Department (now Division) approved, without public notice, hearing or right of appeal, an application to attach a pair of highly visible commercial cell antennas to the top of that pole. In November, 2008, without an clear authority from the City Council, the City Manager signed a long-term lease for use of the City-owned pole, and in January, 2009 impacted residents were notified of imminent construction by a contractor (which, to date, has not yet happened). Adding insult to injury, this has been designated as a preferred site for future collocation.

As it turns out the application was approved based on fraudulent information submitted by the applicant including maps which by failing to disclose a major wireless facility two blocks to the north created the appearance of a major "hole" in coverage where none existed. As it also turns out, under the existing telecom code the planner who approved the application should arguably have referred the matter to a noticed public hearing before the City Council because of the proposal's greater-than-normal impact on private views. In addition, the letting of a lease by the City Manager, although consistent with the Council Policy, was, at least in my view, inconsistent with the City Charter, which permits *only* the City Council to bind the City (an action which to comply with the Brown Act would have to take place at a noticed public meeting). Finally, there is an ongoing disagreement as to whether the approval was granted in perpetuity (the Planning Division's interpretation), or if as an unexercised building permit issued subject to the Uniform Building Code it expired (in the absence of any construction) 180 days after issuance (my interpretation).

My neighbors and I expect no relief from the proposed Wireless Telecommunications Facilities Ordinance since it says it does not affect the status of earlier approvals. Nonetheless this example seems to me a paradigm of at least one situation in which a good telecom code would preclude the issuance of a permit: cell equipment should not be sited where it impairs the enjoyment of public or private property unless there is compelling evidence of a serious gap in coverage that cannot be corrected in any less intrusive manner.

Although I appreciate staff's effort in "updating" the code, to the extent the new code would permit the preceding facility to be approved I will find it wanting.

General Comments

The effort to update the City's wireless regulations and integrate them into the Zoning Code is very commendable, particularly to the extent it brings them under the umbrella of uniform hearing and appeal procedures applicable to other zoning/land use decisions.

That said, it seems unfortunate that the City's Media and Communications Committee no longer exists, for this is potentially a major revision that would have seemed deserving of more public outreach and input before reaching so finalized a state. Although I cannot guarantee they would have participated, I personally know of others who have not been entirely happy with the current process.

Where do the revised regulations belong?

The choice of numbering the commercial wireless regulations as "Chapter 20.49" appears to place them in Title 20 (Zoning Code) under Part 4 (Standards for Specific Land Uses). However that part currently contains only a single chapter (Chapter 20.48: Standards for Specific Land Uses), and "Wireless Telecommunications Facilities" would seem logically to be a section under that, much like Section 20.48.190 (Satellite Antennas and Amateur Radio Facilities). The primary reason for not doing so seems to be that the use of a combination of letters and numbers to designate the subsections within a section is more awkward than the decimal scheme of numbering sections within a chapter. Yet a standalone chapter looks out of place when all the other "Specific Land Uses" are sections within a single chapter.

Alternatively the commercial wireless regulations might belong as a separate chapter in Part 3 (Site Planning and Development Standards), much like Chapter 20.36 (Landscaping Standards) or Chapter 20.42 (Sign Standards). Since those chapters are arranged alphabetically, "Wireless Telecommunications Facilities" would be Chapter 20.47.

The proposed transplanting of the section of wireless-specific definitions from Title 15 to Title 20 as Section 20.49.030 (Definitions) is also awkward, for an effort was made to consolidate *all* the definitions in the new Zoning Code in a single section: Chapter 20.70 (Definitions). Although an exception has already been made in Chapter 20.42 (Sign Standards) – which has its own definition section – consideration should perhaps be given to including a dedicated section of wireless definitions in the "W" section of Chapter 20.70, rather than as a separate section within the Wireless code where they are disconnected from the other zoning definitions.

Specific Comments

20.49.010 – Purpose and Intent.

Minor comments:

- Since the regulations of the California Public Utilities Commission also come into play, the phrase in paragraph "**A. Purpose**" that says "*consistent with federal law*" should perhaps say "*consistent with **state and** federal law.*"

- The capitalization of words in the proposed ordinance is not entirely consistent with the style used in the remainder of the current Zoning Code, although the latter itself has many inconsistencies. "State" and "Federal" should perhaps be capitalized. Words like "Antenna" and "Collocation" should perhaps not be, since defined terms are not generally capitalized in most of the rest of the Zoning Code.

Major comment:

- Paragraph "**A. Purpose**" differs from the existing code by a single word, yet despite the claim in Attachment PC2 that there is "*No policy change*," this is in fact a ***major*** policy change. The word "***public***" has been inserted into the phrase "***protecting scenic, ocean and coastal public views***." Although staff has consistently claimed its presence was implied, it was ***not*** there, and the idea that its presence was implied is contradicted by existing Section 15.70.070 (Permit Review Procedures) where:

    1. under paragraph B.4 (Visual Simulations) it says "***Consideration shall be given to views from both public areas and private residences.***" and

    2. under paragraph F.3.b (Special Review by Council) a required finding for approval by the Council is that "***The approved facility will not result in conditions which are materially detrimental to nearby property owners, residents, and businesses, nor to public health or safety***."

    - In addition, Section 15.70.090 reserved to the City the modify or revoke the permit if changed circumstances resulted in "***Additional impairment of the views from surrounding properties.***"

    - Likewise, the issuance of a permit for construction in the public right-or-way under NBMC 13.20.070 (Issuance of a PROW Permit) requires consideration of the adverse aesthetic effects of any above ground facilities.

    - It is clear, then, that an objective of the existing telecom code is the minimization of impacts on private as well as public views – a commitment that is abandoned, to the detriment of the community, in the proposed revision.

20.49.020 – General Provisions.

Minor comment: in the old Section 15.70.020 the lettered sections were arranged alphabetically. It is unclear if the new arrangement has a better logic to it.

- **B. Permit and/or Agreement Required**.

    - This section seems redundant with Sections 20.49.070 and 20.49.090, to which it refers. For example, Section 20.49.070.A. (Permit Required) restates the

requirements, and stating them in two places seems unwise: at best the statements are consistent, at worst they contradict each other.

- **C. Exempt Facilities.**
    - Paragraph 2 seems to refer to a subset of the items that are, or should be, regulated by the code section referred to in paragraph 1.
    - The reference in paragraph 3 seems to be to Chapter 2.20 of the NMBC, rather than to Title 2 in general (most of which doesn't have to do with emergencies).
- **D. Other Regulations.**
    - Does "Notwithstanding" mean the same as "In addition to"?
    - Three numbered clauses in the existing Section 15.70.020.D have been removed. Two of them are probably subsumed in the new "E. Regulations not in Conflict or Preempted," but the reasons for no longer requiring compliance with "3. Easements, covenants, conditions or restrictions on the underlying real property" are less obvious. The City has a reluctance to enforce covenants as expressed in Chapter 20.10.C.1, but that reluctance to check compatibility should not necessarily apply to wireless proposals, where the applicant is rarely the landowner.

20.49.030 – Definitions.

General comments:

- Again, the wireless-related definitions might more logically be placed in the "W" section of Chapter 20.70 (Definitions). The City of Riverside does this nicely in Section 19.910.240 of their Municipal Code where they have a subsection of "W" devoted to "*Wireless telecommunication facilities*" with the header explaining, among other things, "*The following definitions pertain to the regulation of telecommunications uses*." They have also, unlike Newport Beach, inserted their sign-specific definitions in the "S" section with entries such as "*Sign, spandrel*."
- Many rather poor definitions have been copied over from the existing wireless code. Many other ones really could be cleaned up.

Specific comments:

- **Antenna**.
    - This definition is confused and circular, with "antenna" being included as an example of an antenna.
    - It seems, intentionally or not, to include the handheld cell phone at the consumer end of the transaction.

- "Electromagnetic waves" includes light as well as radio- or microwave-frequency emissions, so the definition would seem to include, probably inadvertently, such things as a laser surveying system, or even an ordinary light.

Some examples from other cities:

- "Antenna, Antenna Array, Wireless Antenna Array, or Wireless Telecommunications Antenna Array." One or more rods, poles, panels, discs, or similar devices used for the transmission or reception of radio frequency signals, that may include omni-directional antennas (whip), directional antennas (panel), and parabolic antennas (disc), but excluding any support structure as defined below.

- "Antennas" - Any system of wires, poles, rods, reflecting discs, dishes, flat panels, or similar devices, including "whip antennas", attached to a telecommunications tower, mast or other structure, which in combination with the radio-frequency radiation generating equipment associated with a base station are used for the transmission or reception of electromagnetic waves.

- 1." Antenna" means a device or system of wires, poles, rods, dishes or other devices of similar function, used for the transmission and/or reception of radio frequency signals for wireless communications, as described in the Telecommunications Act of 1996. It may include an omni-directional antenna ("whip"), a directional antenna ("panel") and parabolic antenna ("disc"). It does not include the support structure. 2. "Antenna Array" means a set of one or more antennae.

- **Antenna Array**.
  - This is a particularly inscrutable definition constructed out of inscrutable phrases, especially since our definition of "antenna" includes "arrays." The very concise definition of "Antenna Array" in "2" above seems better.

- **Antenna Classes**
  - As it stands this seems a purely circular definition.
  - A reference to proposed Section 20.49.050.A (where the "classes" are actually defined) would seem helpful.

- **Distributed Antenna System, DAS**.
  - I thought a DAS was a system of small, low-power, closely spaced antenna stations. Does the reference to "third-party" mean it does not qualify as a DAS if it is built and operated solely for the benefit of the installer?

- **Feasible**.

- Should the definition include economic factors?

- **Stealth or Stealth Facility**.
  - False trees have been deleted, probably intentionally.

- **Utility Tower**.
  - It is unclear why a steel pole is regarded as a "tower." Why would the material matter?

- **Wireless Tower**.
  - The intent of the reference to DAS is unclear. In the example, does it matter if the antenna added is DAS or some other kind?

20.49.040 – Available Technology.

- It was unclear under the old code, and remains unclear why this clause is not included in Section 20.49.020 (General Provisions).

20.49.050 – Location Preferences

- **A. Preferred Locations**
  - **Class 2 (Collocation)**
    - It is unclear why the spelling "*co-located*" is used in preference to "*collocated.*"
    - My reading of this definition is that a completely unscreened facility is Class 2 provided the facility to which new features are added was originally unscreened. It is unclear why this would be a preferred over more numerous but less visible installations.
    - Reading further through the code I'm not sure "collocation" should be a "class" at all. In other parts it sounds like it is a construction technique that could be applied to any one of the other classes.
  - **Class 3 (Visible)**
    - "*a cylindrical Antenna unit that replicates the diameter and color of the pole or standards*" sounds like it might be Class 1, certainly if it was incorporated into the normal length of the pole.
  - **Class 4 (Freestanding Structure)**
    - This class seems to encompass a wide range of structures, some of which are much more obtrusive than others.

- **Class 5 (Temporary)**
  - The meaning of "*such placement of a temporary Telecom Facility shall not exceed 1 year, consistent with Section 20.52.040*" is less than clear since Telecom Facilities are not mentioned in Section 20.52.040. Does this mean that even though not mentioned there, the procedures of Section 20.52.040 with a time limit of less than 1 year?

- **C. Installations in the Public Right-of-Way.**
  - "*Any pedestal meter required for the purpose of providing electrical service power*."
    - Has this exception been made obsolete by Southern California Edison's conversion to "SmartMeters" which do not need to be physically read by a technician?
  - "*Any proposed installation in the public right-of-way shall comply with all requirements of the Americans with Disability Act (ADA), and all other laws, rules, and regulations*."
    - Isn't this redundant with the catch-all clauses in Section 20.49.020 (General Provisions, paragraphs D and E)?

- **D. Collocation Installations**
  - In my view this section should be discretionary rather than mandatory. That is, it should say "***may** be required to collocate*" rather than "***shall** be required to collocate.*" There is no one-size-fits all solution. Ideally the desirability of collocation versus separate installations should be worked out during the public hearing, but the decision has to be made early in the approval process.
  - **Condition Requiring Future Collocation**
    - If the preceding section is mandatory, this seems redundant with it – that is *all* approvals would implicitly include this condition.

20.49.060 – General Development and Design Standards.

- **A. General Criteria**.
  - "*For an example, where a streetlight standard is replaced with a different streetlight standard to allow for the additional installation of Antennas, the primary use shall remain as a streetlight*."
    - It is unclear if this is meant as a definition or a design directive.

- The definition of "Wireless Tower" in Section 20.49.030 implies no size or amount of antennae can ever cause a streetlight to become a wireless tower?
- Does this mean there *is* some threshold at which that would happen, and it is to be avoided?
- If so, should it be elaborated in one of the listed standards? Or is it already implied in "Blending"?

- Apparently this is meant to be read similarly to the explanation of *Screening Standards* in paragraph 20.49.060.F.3.c ("*compatible in scale and proportion to streetlights and traffic control standards and the poles on which they are mounted*") but the tie-in is not immediately obvious to me.

- **B. Public View Protection**.
  - As previously indicated this is a major step back from the present code which protects *both* private *and* public views, and not just from the few (and somewhat arbitrarily located) starred spots on the General Plan map.
  - Although the Zoning Code generally shuns private view protection it is not unprecedented. For example commercial loading docks and roof-mounted equipment are supposed to be screened from view from adjacent residences. And more importantly, the telecom applicant is not normally a landowner restricted to construction on a particular parcel of property

- **C. Height**
  - The reminders about other codes (such as Section 20.30.060.E and 4 U.S.C. § 1) are helpful, but probably redundant with the catch-all applicability of all other codes in Section 20.49.020 (General Provisions).
  - **Maximum Height**.
    - Since the definition of Telecom Facilities in Section 20.49.030 includes the whole shebang (including the antennas, the support structure to which they are attached and even the land on which it sits) the reference to "Telecom Facilities" at the start of each lettered paragraph is at best confusing. I think what is being regulated is the height at which *antennas* (rather than *Telecom Facilities*) can be installed.
    - Lettered paragraph "b" may need some words to clarify how it relates to paragraph "a" – which it is possibly meant to supersede?

- The references to 24 and 20 inches in lettered paragraph "c" are less than clear. They seem to be an attempt to describe the flagpole rather than the "facility," and I'm not sure how "at the top" is to be interpreted. My recollection is cellphone "flagpoles" frequently have an enlarged cylindrical section near the top (housing the antennas) with a small decorative element above that.

- **Over-Height Buildings or Structures**

  - Stealth Telecom Facilities can evidently be of Class 1, 2 or 4? Exactly how that and "the type of installation" are to affect the review seems vague.

- **D. Setbacks**

  - The reference to "*installed on public property or private property*" seems unnecessary. What other kinds of property are there?

- **E. Design Techniques**.

  - This subsection may have absorbed the protections of private views in the existing code, but whether it is intended to include consideration of private views or not is unclear.

- **F. Screening Standards**.

  - Class 3:

    - "*No cables and mounting brackets or any other associated equipment or wires shall be visible from above, below or the side of the Antennas*."

      - This sounds good, but may be unrealistic. I don't recall ever seeing an installation with visible antenna panels in which the mounting brackets and cables were not at least partially visible.

    - "*Antenna installations on existing or replacement streetlight poles, traffic control standards, or Utility Poles shall be screened by means of canisters, radomes, shrouds other screening measures whenever Feasible*.."

      - Large canisters and "radomes" added on top of streetlights and other poles are not necessarily less obtrusive or obnoxious than "exposed" antennas mounted flush to the pole. It is not at all obvious why they would be preferred.

20.49.070 – Permit Review Procedures.

- **A. Permit Required.**
    - "***Table 4-1*** *Permit Requirements for Telecom Facilities*"
        - The index to the existing Zoning Code indicates Title 20 already contains a "***Table 4-1*** *Animal-Keeping Standards*" and a "***Table 4-2*** *Required Setbacks for Structures Housing Domestic Farm Animals*." It would appear that if the proposed code is placed in Part 4 this table will need to be renumbered.
        - Note "a" where it says "*depending on the type of installation and Antenna Class being proposed for the Collocation*" is confusing. I thought a collocated installation was by definition Class 2.
- **B. Application Submission Requirements for Telecom Facilities on City-owned or City-held Trust Properties**.
    - It should be clearly stated that authorization by the written authorization from the City Manager does not guarantee that a lease for use of the property will ultimately be granted by the City Council.
- **H. Required Findings for Telecom Facilities**
    - **1. General.**
        - The term "*review authority*" is used frequently in the proposed code. This seems to be where it is defined. However it is defined by reference to Table 4-1, and that table is less than clear as to who or what the review authority is in most cases.
        - The proposed findings are substantially different from the ones the City Council would currently have to make under Section 15.70.070.F.3.
        - The basic requirement that the facility is needed to provide service seems to be missing. Such a requirement is permitted by case law and needed to prevent an unnecessary proliferation of facilities.
        - The proposed findings seem to preclude placement in parks or on public facilities, since such an application would have to be denied if any other alternative is feasible. Since the City might want the revenue in preference to installation on a nearby private building, the logic behind this is unclear.

20.49.090 – Agreement for Use of City-Owned or City-Held Trust Property

Although outside the scope of the proposed code, I believe, as previously stated, that there is a problem with the procedure of approving the leases formulated by the City Manager and City

Attorney for commercial use of public property as current described in Council Policy L-23 (The Siting of Wireless Telecommunications Equipment on City- Owned Land). The agreement is "approved" by *lack of action* on the part of the City Council, which I believe is inconsistent with both the City Charter and the Brown Act. In addition Policy L-23 will require revision because it currently refers to Chapter 15.70 (which is proposed to be repealed) and to provisions in Title 13 that were never implemented.

20.49.100 – Modification of Existing Telecom Facilities.

- The reference under the definition of "Substantially change" to February 22, 2012 seems oddly stated, and might seem to have the effect of making the following criteria inapplicable to a facility that did not exist on that date?

20.49.120 – Right to Review or Revoke Permit.

- The transplanting of this section from Section 15.70.090 does not seem to have been entirely successful since it no longer explains all the circumstances under which the City reserves the right to review or revoke the permit.

20.49.130 – Removal of Telecom Facilities.

- **B. Abandonment**.
    - I have no problem with reducing the period from 180 days to 90 days, but the reason for doing this is not explained in the staff report.

Omissions

In addition to lack of clarity regarding the minimization of impacts on private properties, the proposed code omits important *Submission Requirements* currently found in Section 15.70.070. These included **the justification for the project, maps (including ones illustrating current and proposed coverage), visual simulations (including ones showing impacts on nearby residences), emission data, wind load calculations and evidence of permission to use property**. I don't know if some of this may be required for use permits in general, but much of it seems wireless-specific and it is very difficult to see how the reviewing authorities could make an intelligent decision about the application without this information.

Finally, I think the proposed code would benefit from comparison with how wireless applications are handled by other California cities. I suspect that beyond the clearer definitions cited above, there are many concepts and specific provisions that could be usefully incorporated.